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MAN FAI TAI CONGO HOLDINGS LTD SARL

v.

INNOVEST BHD

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HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-780-2002]
11 FEBRUARY 2010

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CONTRACT: *Breach - Agreement - Sale and purchase agreement - Termination of agreement by defendant due to refusal of plaintiff to provide defendant with letter of credit in strict compliance with terms of agreement - Plaintiff's claim for refund of sum remitted to defendant - Whether allowed - Whether within defendant's right to forfeit the deposits - Whether*

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there was a breach of the agreement

CONTRACT: *Breach - Agreement - Sale and purchase agreement - Termination of agreement by defendant due to refusal of plaintiff to provide defendant with letter of credit in strict compliance with terms of agreement - Whether defendant entitled to forfeiture of deposits paid by plaintiff - Claim for liquidated damages for breach of agreement - Whether misconceived and must be disallowed*

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The plaintiff's claim arose from a sale and purchase agreement (the SPA) wherein the plaintiff was to purchase and the defendant was to sell 64 units of machines and equipment for use in the timber industry. Under s. 2 of the second schedule of the SPA the plaintiff was required to pay a deposit of USD986,400. The plaintiff proceeded to issue a letter of credit for the balance of the deposit sum of USD657,600 from Dao Heng Bank Ltd Hong Kong made payable to the defendant's nominee IB Timber Industries Sdn Bhd. The defendant refused to accept the plaintiff's letter of credit claiming that it was not in compliance with terms specified in s. 2.2(c) of the second schedule of the SPA. When the plaintiff failed to comply with its request to amend the terms of the letter of credit the defendant terminated the SPA. The plaintiff's claim against the defendant in this suit was for breach of the SPA and sought for, *inter alia*, the refund of the sum of USD328,800 which it had remitted to the defendant. The plaintiff's claim was resisted by the defendant on the main ground that it was entitled to forfeit

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the deposits which it received under s. 2.2(a) of the second schedule of the SPA as the plaintiff was in breach of the SPA for having issuing a letter of credit that departed materially from the terms specified. The defendant counterclaimed for, *inter alia*, the sum of USD986,400 as the agreed liquidated damages for breach of the SPA.

Held (dismissing plaintiff's claim and defendant's counterclaim):

(1) The letter of credit issued by the plaintiff failed to comply with the terms stipulated in s. 2.2(c) which required the letter of credit to be made "payable upon production of Cargo Receipt(s) duly executed by a staff of the purchaser duly authorized to execute the same and made in favour of the vendor's nominee". The defendant had deemed it necessary to request the plaintiff to amend the terms of the letter of credit in order not to curtail its negotiations. Plaintiff had rejected the defendant's request on the ground that it was the requirement of the issuing bank Dao Heng Bank Ltd in Hong Kong that a named authorized person must be appointed to sign the Cargo Receipt and in this respect one Pang Heng Cheong was appointed as the authorized person as he was a staff of the purchaser who had been duly authorized to execute the same and his specimen signature had been provided to the bank. The primary purpose of using a letter of credit as a means of payment was to substitute the credit of the bank for that of the buyer in order to minimize the risk of not getting paid. The requirement that the signature of Pang Heng Cheong "must be in conformity with the specimen held in the letter of credit of the issuing bank" would effectively destroy that purpose by subjecting the defendant to the risk of having the letter of credit rejected by the issuing bank on the mere excuse that the signature of the plaintiff's employee who signed the Cargo Receipt did not match the specimen held at the bank. The certainty of receiving payment was all the more crucial in this case as the defendant was obliged under the terms of the SPA to deliver the machines and equipment before it could begin to draw down on the letter of credit issued by the bank. It was within the right of the defendant to insist that the terms of the letter of credit complied with the terms set out in s. 2.2(c) of the second schedule of the SPA. The refusal of the plaintiff to provide the defendant with a letter of credit in strict compliance with s. 2.2(c) constituted a breach of its obligation to pay the initial deposit required for the purchase of the machines and equipment which entitled the defendant to

forfeit the entire deposit paid pursuant to the provision of s. 2.2(c) of the Second Schedule. Hence, the plaintiff's claim was dismissed with costs. (paras 20, 21 & 22)

(2) As for the defendant's counterclaim, s. 2.2(c) of the second schedule of the SPA itself had set out in clear terms that the defendant was only entitled to the forfeiture of the deposits paid by the plaintiff under s. 2.2(a). It followed that the defendant's claim for "agreed liquidated damages for breach of agreement" of USD986,400 was misconceived and must be disallowed. The whole of the defendant's counterclaim was therefore dismissed. (paras 27, 28 & 29)

For the plaintiff - Claire Skelchy; M/s Zain Johnson & Assocs
For the defendant - Stanley Sinnapan; M/s Vazeer Akbar Majid & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

[1] The plaintiff's claim arose from a sale and purchase agreement (the SPA) wherein the plaintiff was to purchase and the defendant was to sell 64 units of machines and equipment for use in the timber industry. Both the parties were having their logging business in the Republic of Congo.

[2] The purchase price for the 64 units of machines and equipment was for the sum of USD3,288,000.

[3] Under s. 2 of The Second Schedule of the SPA the plaintiff was required to pay a deposit of USD986,400. Out of this sum the plaintiff was required to make a cash payment of USD328,800 within seven days of the contract.

[4] An arrangement was reached off the SPA that for the purpose of satisfying the payment of USD328,800, the plaintiff was to be allowed to use USD128,800 which it had previously advanced to the defendant now standing in the plaintiff's account with the defendant. The remaining balance of USD200,000 was to be paid by plaintiff by telegraphic transfer to the defendant's nominee account in Kuala Lumpur. The said arrangement was confirmed by defendant's letter dated 11 January 2002.

[5] The balance of the deposit sum of USD657,600 had to be paid within 14 days of the contract, by a letter of credit to be issued to the defendant pursuant to s. 2.2(c) of The Second Schedule which read as follows:

> (c) within fourteen (14) days from the date of this Agreement, by way of Irrevocable Letter of Credit ("LC") issued by a reputable bank based in Hong Kong payable upon production of Cargo Receipt[s] duly executed by a staff of the Purchaser duly authorized to execute the same and made in favour of the Vendor's Nominee:
>
> (i) For Minimum Delivery = USD 330,600.00
>
> (ii) For Balance Delivery = USD 327,000.00
>
> (iii) Total = USD 657,600.00
>
> failing which the Vendor shall be entitled to forfeit amount of Deposit paid pursuant to Section 2.2[a] of this Second Schedule.

[6] Clause 5 of the SPA obliged the defendant to deliver the 64 units of the machines and equipment to the plaintiff in Congo in two batches, the first within 30 days, and the second within 75 days from the date of the signing of the SPA. Under s. 3.2 of The Second Schedule they were to be paid for by standby letter of credits 14 days after the issuance of Cargo Receipts in respect of each batch delivery.

[7] The plaintiff effected the telegraphic transfer of the sum of USD200,000 which was duly received by the defendant.

[8] The plaintiff then proceeded to issue a letter of credit for the sum of USD657,600 from Dao Heng Bank Ltd Hong Kong made payable to the defendant's nominee IB Timber Industries Sdn Bhd on the following restricted terms:

> Signed commercial invoices in quadruplicate; dated cargo receipt issued and signed by Pang Heng Cheong holder of passport No. S0123261D of applicant, whose signature(s) must be in conformity with the specimen held in L/C issuing bank, evidencing that the goods have been received in good order and condition, showing value of goods received, and this L/C number, as per attached specimen.

[9] The defendant refused to accept the plaintiff's letter of credit claiming that it was not in compliance with terms specified in s. 2.2(c).

[10] When the plaintiff failed to comply with its request to amend the terms of the letter of credit the defendant terminated the SPA.

The Dispute

[11] The plaintiff's claim against the defendant in this suit is for breach of the SPA. It seeks:

a) the refund of the sum of USD328,800 which it had remitted to the defendant;

b) payment of liquidated ascertained damages of USD986,400 being agreed liquidated damages;

c) general damages to be assessed; costs and interest at the rate of 8% per annum on USD1,315,200 from the date of this writ until full payment.

[12] The plaintiff's claim is resisted by the defendant on the main ground that it was entitled to forfeit the deposits which it received under s. 2.2(a) of The Second Schedule of the SPA as the plaintiff was in breach of the SPA for having failed to issue a letter of credit on the terms described under s. 2.2(c).

[13] The terms on the letter of credit issued by the plaintiff it is submitted, departed materially from the terms specified under s. 2.2(c) that it should be "... payable upon production of Cargo Receipt(s) duly executed by a staff of the purchaser duly authorized to execute the same ...". There was no requirement that the signature of the staff who executed the cargo receipt has to be verified by the bank with the signature kept by it.

[14] The plaintiff's claim is also resisted on the lesser ground that the plaintiff did not have sufficient fund standing to its credit with the defendant to be used to pay the defendant the cash deposit sum of USD328,800 under s. 2.2(a) of The Second Schedule by the method verbally agreed upon as described earlier. The defendant contends that the plaintiff only had a credit balance of USD119,028.12 in its account - USD9,771.88 short of the sum of USD128,800 required to pay the cash deposit sum of USD328,800. It is submitted therefore, that the plaintiff was also in breach of the SPA.

[15] The defendant counterclaims:

(i) the sum of USD986,400 as the agreed liquidated damages for breach of the SPA;

(ii) for unpaid rental of 6 units of machines and equipment which the defendant orally let to the plaintiff from 1 December 2001 to 30 April 2002, from May 2002 to 30 September 2002 and from October 2002 until the return of the machines and equipment to the defendant for a total sum of USD3,288,000.

Decision

[16] The plaintiff had satisfied the cash deposit of USD328,800 under s. 2.2(a) by the telegraphic transfer of USD200,000 and cash payment of USD128,800 to be deducted from the plaintiff's monies standing in the plaintiff's account. The fact that the plaintiff may not have sufficient fund standing to its credit in its account is irrelevant as it is clear that the defendant by para. 2.2 of this letter had agreed that this sum was to be deducted from the advances that the plaintiff previously made to the defendant, the exact sum of which had not been determined at the time. It is to be implied as a matter of common sense that should there be any shortfall, this would have to be settled later by the plaintiff.

[17] Having settled the payment of the sum of USD328,800 all that remained to keep the SPA alive was for the plaintiff to issue the letter of credit of USD657,600 complying with s. 2.2(c) of The Second Schedule.

[18] It is clear that although the letter of credit for that sum was issued by the plaintiff within fourteen days from the date of the SPA it failed to comply with the terms stipulated in s. 2.2(c) which requires the letter of credit to be made "payable upon production of Cargo Receipt(s) duly executed by a staff of the purchaser duly authorized to execute the same and made in favour of the vendor's nominee".

[19] The defendant deemed it necessary to request the plaintiff to amend the terms of the letter of credit in order not to curtail its negotiations, by a faxed letter dated 6 February 2002 to read:

> Dated Cargo Receipt Issued And Duly Signed For And On Behalf Of Golden Laurel Development Ltd Evidencing That The Goods Have Been Received In Good Order And Condition, Showing Value Of Goods Received, And This L/C Number, As Per Specimen Attached.

[20] The evidence shows that the plaintiff by its faxed letter dated 7 February 2002 rejected the defendant's request on the ground that it was the requirement of the issuing bank Dao Heng Bank Ltd in Hong Kong that a named authorized person must be appointed to sign the Cargo Receipt and in this respect Pang Heng Cheong was appointed as the authorized person and his specimen signature had been provided to the bank.

[21] I accept the submission of the plaintiff that naming Pang Heng Cheong as the person who will sign the Cargo Receipt was well within the terms of The Second Schedule Section 2.2(c) of the SPA *(supra)* as he was a staff of the purchaser who had been duly authorized to execute the same. However, in my judgment the requirement that his signature "must be in conformity with the specimen held in the letter of credit of the issuing bank" constitutes a material departure from the original terms of s. 2.2(c) of The Second Schedule of the SPA. The primary purpose of using a letter of credit as a means of payment is to substitute the credit of the bank for that of the buyer in order to minimize the risk of not getting paid. The requirement that the signature of Pang Heng Cheong "must be in conformity with the specimen held in the letter of credit of the issuing bank" would effectively destroy that purpose by subjecting the defendant to the risk of having the letter of credit rejected by the issuing bank on the mere excuse that the signature of the plaintiff's employee who signed the Cargo Receipt did not match the specimen held at the bank.

[22] The certainty of receiving payment was all the more crucial in this case as the defendant was obliged under the terms of the SPA to deliver the machines and equipment before it could begin to draw down on the letter of credit issued by the bank. This is clear from table Appendix 1 Summary Schedule of Payment of Purchase Price of the SPA. It was therefore within the right of the defendant to insist that the terms of the letter of credit complied with the terms set out in s. 2.2(c) of The Second Schedule of the SPA.

[23] The submission of the plaintiff that Dao Heng Bank from whom the letter of credit was purchased dictated the terms on the letter of credit and that the reason for insisting on the conformity of the signature with the specimen signature it had kept was to protect itself from fraudulent claim is unacceptable. Indeed if the purpose of verification of the signature of Pang Heng Cheong was required, this could easily be confirmed directly by the bank from the plaintiff before payment is made on the letter of credit. It

should be well within the means of the plaintiff to obtain from an issuing bank a letter of credit which need not require the issuing bank to compare the signature of the plaintiff's staff with the specimen signature it kept.

[24] The terms as proposed in the specimen of the defendant's faxed letter dated 6 February 2002 to the plaintiff accurately reflect the requisite terms under s. 2.2(c). The defendant was therefore justified in insisting that the plaintiff issues the letter of credit as per that specimen.

[25] The refusal of the plaintiff to provide the defendant with a letter of credit in strict compliance with s. 2.2(c) in my judgment constitutes a breach of its obligation to pay the initial deposit required for the purchase of the machines and equipment which entitles the defendant to forfeit the entire deposit paid pursuant to the provision of s. 2.2(c) of The Second Schedule which read:

> ... failing which the Vendor shall be entitled to forfeit amount of Deposit paid pursuant to Section 2.2(a) of this Second Schedule.

[26] For the foregoing reasons I am constrained to dismiss the plaintiff's claim with costs.

The Counterclaim

[27] Section 2.2(c) of The Second Schedule of the SPA itself sets out in clear terms that the defendant is only entitled to the forfeiture of the deposits paid by the plaintiff under s. 2.2(a). It follows that the defendant's claim for "agreed liquidated damages for breach of agreement" of USD986,400 is misconceived and must be disallowed.

[28] So is the defendant's claim for rental of the machines and equipment which it claimed to have been let to the plaintiff by an oral agreement before the parties entered into the SPA. The plaintiff had denied the existence of such an agreement. No evidence was provided by the defendant to substantiate the alleged oral agreement beyond the bare assertion of its "consultant" one Dato' Sri Wong Yeon Chai who it is clear did not possess any personal knowledge of the alleged agreement.

[29] In the event, the whole of the defendant's counterclaim must be dismissed with costs.